Supreme Court, U.S.
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No. 98-1808

IN THE

Supreme Court of the United States

BRUCE CURETON, *et al.*,

Petitioners,

v.

GARY G. SHARPE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondents object to the Question Presented for Review in Petitioners' Writ of Certiorari, in that they characterize respondents' claims as based only upon First Amendment violations. Respondents' claims were brought pursuant to the Fifth and Fourteenth Amendments as well. Petitioners also misstate the extent of the damages to the respondents. Based upon the facts of the case, the following question is presented for review:

Whether petitioners knew or should have known that abrupt and unjustified transfers, denial of cycle pay, revocation of drive-home car rights, demotion, assignment to work in a supply closet, reduction of hourly wages, failure to promote, denials of merit pay and refusals to consider for merit pay, all motivated by political animus, violated the clearly established constitutional rights of respondents (government employees).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents object to the petitioners' characterization of the constitutional and statutory provisions involved. Respondents' case was brought pursuant to the First, Fifth, and Fourteenth Amendments of the United States Constitution. The First Amendment is set forth in Petitioners' Appendix ("Pet. App.") at 69a. The Fifth Amendment is found in Respondents' Appendix at 1a, and the Fourteenth Amendment is found in Respondents' Appendix ("Resp. App.") at 2a. The pertinent statute, 42 U.S.C. § 1983, is found in Pet. App. at 70a.

STATEMENT OF THE CASE

In 1995, multi-term Mayor Victor Ashe ("Ashe") faced his most serious challenge in an election against opponent Ivan Harmon ("Harmon"). Sixth Circuit Opinion, Pet. App. at 2a. Within hours of his re-election, Ashe's retaliation against those who had not supported him began (*id.* at 3a) and included the following:

At 10:48 p.m. on election night, Fire Officer Kenneth Scarbrough (Harmon supporter) was ordered to transfer from North Knoxville to South Knoxville. In Scarbrough's then twenty-eight (28) years with the department he had never been stationed in South Knoxville. District Court Memorandum Opinion, Pet. App. at 21a.

Assistant Chief Frank Potter (Harmon supporter) who had served virtually all of his career in North Knoxville was, on the eve of the election, abruptly transferred to the West District with which he was unfamiliar. *Id.*

Assistant Chief William McGinnis (non-supporter of Ashe) was transferred on the eve of the election, mid-cycle causing him to lose cycle pay. *Id.* at 22a.

The day after the election, William Potter, brother of Frank Potter and Administrative Deputy Chief of Firefighting (Harmon supporter) was relieved of his duties in the administrative office and assigned a "new" job that was created the day after the election and a "new office" in a supply closet. *Id.* at 22a, 25a. Chief William Potter had no experience or training for his "new job." *Id.* He lost the use of his drive home car with that transfer. *Id.* at 22a. Chief Potter was later demoted to Shift Chief and his hours were increased from 40 hours per week to 56 hours per week. *Id.* His hourly pay was reduced from $21.25 per hour to $15.18 per hour. Armstrong Affidavit, Pet. App. at 60a, Paragraph No. 5.

Master firefighter Gary Sharpe who had applied for promotion to Fire Officer was ranked sixth (6th) among the thirty-nine (39) applicants who passed the Civil Service examination. Sharpe (Harmon supporter) was denied promotion as were all other Harmon supporters. 6th Cir. Opinion, Pet. App. at 2a; District Court Memorandum Opinion, Pet. App. at 23a; McGinnis Affidavit, Resp. App. at 3a-6a. The petitioners went to the bottom of the list, number thirty-nine (39), to distribute the twenty (20) available promotions. Pet. App. at 23a; McGinnis Affidavit, Resp. App. at 5a.

Not a single person associated with Harmon (including all respondents) received a step increase (permanent two and one-half percent ~~(2½%)~~ pay raise) or a promotion following the 1995 election. McGinnis Affidavit, Resp. App. at 3a-6a. Of the firefighters who received the most coveted awards for 1995 (two steps, five percent (5%) salary increase),

virtually all had given financial contributions to Ashe's campaign or served on the host committees for Ashe campaign events. *Id.* Because respondents exercised their right to file this lawsuit, none of them was even considered for the merit pay increases awarded for 1996. 6th Cir. Opinion, Pet. App. at 3a.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT MEET THE STANDARDS FOR REVIEW BY THIS COURT.

Petitioners apparently rely upon Supreme Court Rule 10(a) ("a decision in conflict with the decision of another United States court of appeals on the same important matter") and/or Rule 10(c) ("an important question of federal law that has not been, but should be, settled by this Court") to advance their Petition for Certiorari, but they fail to satisfy either standard.

This is a pretrial, interlocutory appeal of the decision of the United States Court of Appeals for the Sixth Circuit affirming the trial court's denial of petitioners' claim of qualified immunity. In this procedural posture, petitioners have conceded that their actions were motivated by political animus and all facts must be viewed in the light most favorable to respondents. *See, e.g.*, 6th Cir. Opinion, Pet. App. at 4a; District Court Memorandum Opinion, Pet. App. at 23a-24a; and *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Hence, the only question properly before this Court is whether the Sixth Circuit erred in denying qualified immunity.

One would expect that the issue in such a qualified immunity appeal would be either the legal standard for qualified immunity or its application. What petitioners seek **instead**, is reversal or modification of *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990), the undisputed yardstick by which the petitioners' conduct was, and is, measured. To the extent that petitioners seek a modification of *Rutan*, the issue is not properly before this Court since qualified immunity requires that the conduct of the petitioners be measured against the existing law in 1995. However dissatisfied petitioners may be with *Rutan* and its progeny, the attack on *Rutan* must await another day.

Petitioners' second approach is to suggest that the Sixth Circuit misapplied *Rutan*. Conspicuously absent from the Petition, however, is any reference to language in *Rutan* that was theoretically misapplied. Quite the contrary, if anything, petitioners attack the Sixth Circuit because it **did** apply the teachings of *Rutan* — that the government must have a compelling state's interest to abridge the fundamental right of political freedom. *Rutan*, 497 U.S. at 74. Petitioners have not identified a compelling state's interest for their action, only a desire to be free to use governmental power and the bounty of the public trust as they wish and without accountability.

II.

THERE IS NO CONFLICT IN THE CIRCUITS REGARDING PATRONAGE CASES.

Both lower courts followed this Court's mandate in *Rutan*, which evolved from well-settled precedent of *Elrod v. Burns*, 427 U.S. 347 (1976). Like the Sixth Circuit, the other circuits continue to recognize the vitality of *Rutan* in patronage cases. *See, e.g., Rivera-Ruiz v. Gonzalez-Rivera*,

983 F.2d 332 (1st Cir. 1993) (demotion and transfer based on political discrimination violated clearly established rights); *Coogan v. Smyers*, 134 F.3d 479 (2nd Cir. 1998) (vacated and remanded to determine whether the decision not to reappoint City Clerk was based on political animus; cites *Rutan* with approval); *Stephens v. Kerrigan*, 122 F.3d 171 (3d Cir. 1997) (summary judgment reversed where evidence of improper political motive shown; cites *Rutan* with approval); *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993) (explains that after *Rutan*, claims based on transfers for improper political motive are actionable); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998) (failure to rehire for politically motivated reasons is actionable; cites *Rutan* with approval); *Faughender v. City of North Olmstead*, 927 F.2d 909 (6th Cir. 1991) (cites *Rutan* and applies it to "other common varieties of patronage preferment"); *Heck v. City of Freeport*, 985 F.2d 305, 308 (7th Cir. 1993) (*Rutan* "expanded the set of banned practices from firings to virtually all employment decisions").

Throughout this appeal process, the petitioners have been unable to identify a single **patronage** case holding contrary to the *Elrod-Rutan* authority. Instead, petitioners have attempted to **create** the required conflict in the circuits by citing a number of First Amendment, Title VII, and ADA cases. As this Court has taught, First Amendment freedom of speech claims involve a different inquiry and use a distinct test from that applied to patronage claims. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (establishes balancing test for analyzing freedom of speech cases).

Further, this Court expressly rejected the attempt in *Rutan* to apply Title VII precedent to that patronage case and thereby require a "significant adverse action" by the

employer. *Rutan*, 497 U.S. at 73, n.6. Moreover, the Title VII/ADA cases cited by petitioners below have been implicitly overruled or modified by this Court's decisions of *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998). The "sufficiently adverse" inquiry for Title VII cases is no longer critical to a *prima facie* case. Specifically, if no "tangible employment action" is found, the employer may raise an affirmative defense to liability (if the employer has undertaken appropriate preventive/curative actions). *Faragher*, 524 U.S. at __, 118 S. Ct. at 2292. If, however, adverse employment action has resulted, the employer's liability is vicarious and certain. *See Faragher* 524 U.S. at __, 118 S. Ct. at 2292 and *Burlington Industries*, 524 U.S. at __, 118 S. Ct. at 2270.

Petitioners rely upon *Rogers v. Miller*, 57 F.3d 986 (11th Cir. 1995); *Larou v. Ridlon*, 98 F.3d 659 (1st Cir. 1996); and *Walsh v. Ward*, 991 F.2d 1344 (7th Cir. 1993) as their only support for arguing that a division exists in the circuit courts on the interpretation and application of *Rutan*. Those cases do not establish such a division.

In *Rogers*, for example, the Eleventh Circuit made no criticism whatsoever of *Rutan*, and expressly acknowledged that "adverse employment action" is "broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands." *Rogers*, 57 F.3d at 992. On the particular facts of that case the court did not find political animus associated with the transfers (*id.* at 991), nor sufficient precedent existing at that time to make public officials aware that mere warnings regarding political activities could subject those officials to liability. *Id.* at 992. *Rogers* does not criticize *Rutan* much less deviate from it. It cannot provide a basis for this Court to grant review.

Petitioners' reliance on *Larou* is likewise misplaced. *Larou* neither criticizes nor applies *Rutan*. The *Larou* plaintiff did not prevail because the evidence failed regarding political motives. *Id.* at 662.

Finally, although petitioners claim that *Walsh* conflicts with the Sixth Circuit's construction of *Rutan* (Petition for Writ of Certiorari at 18), *Walsh* merely holds that:

> Reasonable supervisors acting in **1988** would not have understood that the law 'clearly established' that a promotion to a suitable job can nonetheless violate the Constitution when it diminishes an employee's opportunity to make money elsewhere.

Id. at 1347 (emphasis added). The *Walsh* court applied the law as it existed **before** it's *en banc* decision in *Rutan* was reversed by this Court. The *Walsh* decision does not construe or apply *Rutan* — it cannot possibly be the source of a conflict in the circuits on the construction of *Rutan*. Moreover, the Seventh Circuit in *Walsh* cited with approval its earlier finding that "[a] campaign of petty harassment may achieve the same effect as an explicit punishment." *Walsh*, 991 F.2d at 1345, *citing Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989) and *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). That finding is particularly pertinent on petitioners' claim of a safe harbor for petty harassment. There is no conflict among the circuits regarding the application of *Rutan* to facts such as these.

Petitioners apparently hope that personnel changes in the court since *Rutan* will be sufficient to reverse this Court's longstanding prohibition on patronage. Experience with *Rutan*, however, has demonstrated that the flood of litigation that many predicted simply did not materialize. *See, e.g.*,

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996). Against the backdrop of *Faragher* and *Burlington Industries* there is no reason to believe that this Court should be tempted to retreat from protecting the most fundamental of democratic rights.

To permit the overwhelming power of government to be used to coerce political belief is a threat to both the system and to the individual's fundamental freedom. This Court should not empower such governmental abuse by allowing government employers with political animus to defend on a claim that their intentional, hurtful acts were too petty for redress.

III.

THERE IS NO UNSETTLED QUESTION OF FEDERAL LAW IMPLICATED HERE.

The prohibition on political patronage and the scope of that prohibition have been clearly, consistently, and repeatedly addressed by this Court. For over twenty (20) years, this Court has recognized that "political belief and association constitute the **core** of those activities protected by the First Amendment," and that to condition public employment on partisan support "prevents support of competing political interests." *Elrod*, 427 U.S. at 356 (emphasis added). Moreover, in *Elrod* this Court warned that the impermissible motive is the focus, even if the injury is the mere withholding of one penny. *Id.* at 360, n.13.

The "important question of federal law" was, therefore, settled decades ago and reinforced in 1980 in *Branti v. Finkel*, 445 U.S. 507 (1980), in 1990 in *Elrod*, and again in 1996 in *O'Hare Trucking*. The message has been clear: political discrimination against governmental employees will not be

tolerated whether the action is great or small. Petty retaliations will not be encouraged by giving protection to actors who intend to inflict injury and then complain about the burden they face if called to answer for their actions.

Moreover, although petitioners attempt to trivialize their actions herein, this is not a "withheld birthday party" or a petty case. This is a classic case of an improper exercise of power to punish those who would not bow to the political agenda of those wishing to continue control of the local government.

In many respects, these facts are more egregious than those in *Rutan* where the denial of a transfer to a more convenient office was of potential constitutional magnitude. *Rutan*, 497 U.S. at 73. These respondents have not complained of denial of a hoped-for transfer for convenience, but of punitive, abrupt, and unjustified transfers, demotion, loss of cycle pay, loss of drive home car, assignment to work in a closet, reduction in pay, failure to promote, denial of merit pay, denial of consideration for merit pay and other punitive conduct. The actions complained of were so punitive that the Sixth Circuit rightly found "[o]ne would have to be a person of more than ordinary firmness to be willing to pay the price allegedly exacted by the Ashe administration for the privilege of declining a place on the mayor's bandwagon." Pet. App. at. 5a.

Petitioners' selective molding of their "facts" cannot alter reality. For example, petitioners' assertion that Kenneth Scarbrough, Frank Potter and William McGinnis were returned to their "favored" fire departments within one (1) year of their transfers (Petition for Writ of Certiorari at 3-4) (as though a year of punishment were *de minimis*) is misleading. They were returned to their districts **only** after nearly a year of legal proceedings and as part of a failed

attempt at settlement in the grievance proceedings. District Court Memorandum Opinion, Pet. App. at 31a-32a.

Petitioners mischaracterize the transfers as being "across the street." The transfers were from the North end of the city to the South (as to Kenneth Scarbrough) (District Court Memorandum Opinion, Pet. App. at 21a), and between the North and the West (as to Frank Potter and William McGinnis). Moreover, William Potter's transfer out of the Administrative Offices to the closet at Headquarters may not have involved a great distance, but the intent to injure is undeniable.

Finally, petitioners complain that respondents are elevating personal grievances to the level of constitutional claims, referring to the Mayor's refusal to support a pension amendment. This mischaracterization by petitioners has occurred time and again throughout this lawsuit. District Court Memorandum Opinion, Pet. App. at 35a. Petitioners continue to miss the point. The pension issue has never been a separate claim, only more evidence of the political animus and retaliation that pervades the Ashe administration. *See generally*, Cummins Affidavit, Resp. App. at 7a to 10a.

CONCLUSION

There is no conflict between the Sixth Circuit's application of patronage law and that of other circuits. Nor is there a need for this Court to re-address the decades of well-settled law that limits governmental abuse of power. Those who abuse the public trust for their own gratification should continue to bear the burden of answering for their actions, whether grand or petty. Hence, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENT 5 — UNITED STATES CONSTITUTION

Section 1 — Trials for crimes; just compensation for private property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix A

AMENDMENT 14 — UNITED STATES CONSTITUTION

Section 1 — Citizenship defined; privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B — AFFIDAVIT OF WILLIAM H. MCGINNIS DATED AUGUST 28, 1997

IN THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

No. 3:96-CV-916
JURY DEMAND

GARY G. SHARPE, WILLIAM G. POTTER, KENNETH F. SCARBROUGH, FRANK E. POTTER, AND WILLIAM H. McGINNIS,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, in his individual and official capacities, MAYOR VICTOR ASHE, in his individual and official capacities, and DEPUTY FIRE CHIEF ROBERT PRESSLEY, in his individual and official capacities, and THE CITY OF KNOXVILLE,

Defendants.

AFFIDAVIT OF WILLIAM H. McGINNIS

I, William H. McGinnis, upon personal knowledge, do hereby swear and affirm as follows:

1. I am an Assistant Chief at the Knoxville Fire Department.

Appendix B

2. I have reviewed the records of the Knox County Election Commission setting forth the reported contributions to the 1995 Mayoral campaign.

3. I have reviewed the Knoxville Fire Department's final list of merit pay awards for 1995 and 1996.

4. I have reviewed the 1995 Host Committee list for the Ashe campaign event held at Gene Hamlin's house.

5. I have reviewed the Knoxville Fire Department promotion lists for early 1996.

6. I have reviewed the Union vote list generated by Deputy Chief Robert Pressley identifying the votes of the firefighters at the 1995 Firefighters Association meeting regarding endorsement of Mayoral candidates in the 1995 race.

7. Not a single firefighter associated with the Ivan Harmon Mayoral campaign received a step increase (2½ to 5% salary increase) for the 1995 year, or promotion in 1996.

8. Only one Ivan Harmon supporter was offered a bonus during that year.

9. Of the forty-nine (49) firefighters on the Host Committee for the Ashe fund-raiser held at Gene Hamlin's house, forty-three (43) received merit pay and/or promotion (88%).

10. Of the fifty-four (54) firefighters recorded by Robert Pressley as voting for Mayor Ashe at the Union

meeting who were eligible for merit pay or promotions, fifty-one (51) received merit pay or a promotion shortly after the election (94%). None of the firefighters who were identified as voting for Ivan Harmon (20) at the Union meeting received merit pay or promotion.

11. Similarly, ninety-one (91) percent of the firefighters identified in the Election Commission records as Ashe contributors, benefited with merit pay or a promotion shortly after the election.

12. Of those firefighters who received the most coveted awards (two steps, a five 5% salary increase) seventy-nine percent (79%) gave financial contributions to Mayor Ashe's campaign and/or served on the Host Committee for Mayor Ashe's campaign events.

13. The promotions to Fire Officer were announced in February 1996. Twenty-two (22) of the twenty-five (25) promoted had made financial contributions to Ashe's 1995 campaign or voted for Ashe in the Union vote. All Ivan Harmon supporters were passed over, and the Fire Department went all the way to the bottom of the list to promote Ashe supporters.

FURTHER AFFIANT SAITH NOT.

_____

William H. McGinnis

Appendix B

Sworn to and subscribed before me this ____ day of ____, 1997.

_____
Notary Public

My Commission Expires:
_____

APPENDIX C — AFFIDAVIT OF PATRICK CUMMINS DATED AUGUST 28, 1997

IN THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

No. 3:96-CV-916

JURY DEMAND

GARY G. SHARPE, WILLIAM G. POTTER, KENNETH F. SCARBROUGH, FRANK E. POTTER, AND WILLIAM H. McGINNIS,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, in his individual and official capacities, MAYOR VICTOR ASHE, in his individual and official capacities, and DEPUTY FIRE CHIEF ROBERT PRESSLEY, in his individual and official capacities, and THE CITY OF KNOXVILLE,

Defendants.

AFFIDAVIT OF PATRICK CUMMINS

I, Patrick Cummins, upon personal knowledge do hereby swear and affirm as follows:

1. I worked for the Knoxville Fire Department for thirty-two (32) years. In July of 1995, I was a Deputy Chief with the Knoxville Fire Department and was the supervisor

of James Crawford. On July 9, 1995, James Crawford failed to report at 7:00 a.m. for his shift. James Crawford, as acting captain, thus recorded his tardiness as a twelve (12) hour suspension on the attached time sheet as had always been the custom and policy within the fire department. During my employment with the fire department, I always understood such tardiness to result in a twelve (12) hour suspension with loss of pay and that such was a disciplinary action. This is precisely how James Crawford's and all other twelve (12) hour suspensions during my employment were treated.

2. In 1988, when the Knoxville Fire Department hired its first class of new hires in eleven years, I was on the committee that reviewed the applications and drafted a list of recommended new hires. I personally delivered the list of recommendations to Mayor Ashe, who, in my presence, struck the names of several people off of the list and explained that he was doing so because they did not support him in his Mayoral campaign, were related to firefighters who did not support him, or did not recognize the name as associated with campaign efforts.

3. In 1988, I was on the promotion committee for the promotion of Mechanical Operators within the fire department. After the promotion committee made the decisions or recommended promotions, I personally delivered the list of promotees to Mayor Ashe's office. Mayor Ashe reviewed the list in my presence and, when he saw Michael Floyd's name on the list, asked me if that was the same Mr. Floyd who worked at Station 3. When I replied that such was the case, Mayor Ashe made the comment that

Michael Floyd did not do a whole lot for him in the election and struck Mr. Floyd's name from the list of promotees.

4. During the Assistant Mechanical Operator promotions, approximately in late 1988, there were at most twenty-five to thirty (25-30) positions to be filled. Mayor Ashe instructed me to promote Bob Boatman, who was number 45 in the rank of Civil Service test scores. Mayor Ashe explained that he instructed that Mr. Boatman be promoted because Mr. Boatman had supported Mayor Ashe in his campaign. I personally delivered the list of promotees to Mayor Ashe, which also contained the name of Gary Sharpe. It was well known that Gary Sharpe did not support Mayor Ashe. Later, when the list was published, Gary Sharpe's name had been deleted from the list.

5. I personally supported Ivan Harmon in the last Mayoral election, and because of my support of Ivan Harmon, I was refused tuition reimbursement, and was later selected to be bumped from my position as Deputy Chief to create the position into which William Potter was demoted.

FURTHER AFFIANT SAITH NOT.

_____

Patrick Cummins

Appendix C

Sworn to and subscribed before me this ____ day of ____, 1997.

_____
Notary Public

My Commission Expires:

_____